No. 3375

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD WHITE, as Commissioner of Immigration, for the Port of San Francisco,

Appellant,

vs.

FONG GIN GEE,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

JOSEPH P. FALLON,
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Appellee.

APPELLEE'S PETITION FOR A REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellee respectfully petitions that the decision of this Court herein be set aside and that a rehearing of the cause be granted.

The ground of the application is that the unfairness and abuse of discretion on the part of the Immigration Officials in the proceeding consists of this:

That while their judgment of the facts is conclusive, provided the same is founded on substantial evidence and not mere conjecture and suspicion, yet having once found the facts, the application of the law to those facts is a matter of law of which the Court is bound to take cognizance.

UNFAIRNESS.

The Court in its opinion, after stating that the Immigration Officials are the sole judges of the facts, proceeds to discuss the facts of the case and finally determines that the Secretary of Labor's decision to the effect that the appellee's father was not a merchant, but a mere peddler, or huckster, is final and the Court cannot interfere with said decision. In support of this position, the Court quotes from the decision in the case of Lai Moy v. United States, 66 Fed. 955, to the effect that a

> "Chinese person, who, during half of his time is engaged in cutting and sewing garments for sale by a firm of which he is a member, is engaged in manual labor not necessary in the conduct of his business, and is not a merchant within the meaning of the Statute".

We respectfully submit that this is not the situation in the instant case. The purpose of the Chinese Exclusion and Restriction Acts is to prevent competition between Oriental and American labor. The cutting and sewing of garments consists in the manufacturing and changing of one form of commodity

into that of another and must necessarily be consummated by the exercise of manual labor. In the instant case it is admitted that the Man Hop Company is a business conducted at a fixed place and in one of its departments deals in poultry and eggs, and in every particular fully complies with the law. In order to conduct that business or any business of that nature there must be buying and selling and delivery of the goods so bought and sold. There is no change, however, in the form of the commodities sold. This, as pointed out in many decisions is not such labor to prevent which the Chinese Exclusion Law was enacted. It is pointed out in the decision that the appellee's father is ignorant of certain features of the business of the Man Hop Company, and that fact would indicate that he was not a bona fide member of said company. This is not unusual in Chinese mercantile establishments, nor is it even unusual in American mercantile establishments for the partners to be unfamiliar with all departments of the business. It is to be noted that the Immigration Officials do not find that the appellee's father has no interest in the store, but contend that the work he performs is that of a laborer.

The facts as conceded by the Immigration Officials are that the appellee's father is a member of the Man Hop Company and that said company conducts a business at a fixed place; that they deal in poultry; that orders are taken by the firm and the poultry delivered by the appellee's father. Surely that work is necessary to the conduct of the business

and being necessary to the conduct of the business it is a matter of law that he is a merchant. To assume that because he was once a peddler, he is always to remain such in the face of the facts as found, is certainly unfair and contrary to the law.

For the foregoing reasons, we earnestly and respectfully urge the Court to grant this petition for a rehearing.

Dated, San Francisco,
July 28, 1920.

JOSEPH P. FALLON,
Attorney for Appellee and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for the appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
July 28, 1920.

JOSEPH P. FALLON,
Of Counsel for Appellee and Petitioner.